

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CRAIG W.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. C20-437-BAT

**ORDER REVERSING THE
COMMISSIONER AND REMANDING
FOR FURTHER PROCEEDINGS**

Plaintiff claims he became on June 6, 2011. Plaintiff appeals the ALJ's decision rejecting this claim and instead finding he became disabled after March 28, 2018. The ALJ found obesity, osteoarthritis of the left ankle, tarsal coalition, PTSD, bipolar and related disorders, antisocial personality disorder, panic disorder and anxiety are severe impairments; these impairments fail to meet or equal the requirements of a Listed Impairment; plaintiff has the residual functional capacity (RFC) to perform light work with other mental limitations; and plaintiff cannot perform past relevant work. The ALJ determined plaintiff was not disabled before March 28, 2018, but after that date he became disabled due to a change of age category. Tr. 36-48.

Plaintiff contends the ALJ erred by failing to evaluate certain conditions at step two; rejecting his testimony; making a RFC determination not accounting for all limitations; and failing to make sufficient step five findings. Dkt. 22. For the reasons below, the Court

1 **REVERSES** the Commissioner’s final decision and **REMANDS** the matter for further
2 administrative proceedings under sentence four of 42 U.S.C. § 405(g).

3 **A. Step Two**

4 At step two, plaintiff has the burden to show (1) he has a medically determinable
5 impairment or combination of impairments and (2) the impairment or combination of
6 impairments is severe. *See Bowen v. Yuckert*, 482 U.S. 137, 146 (1987). An impairment is
7 medically determinable if it results from anatomical, physiological, or psychological
8 abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic
9 techniques. 20 C.F.R. § 404.1508. To be medically determinable, a physical or mental
10 impairment must be established by medical evidence consisting of signs, symptoms, and
11 laboratory findings. *Id.* On the other hand, symptoms are the claimant’s own descriptions of his
12 physical or mental impairment. 20 C.F.R. § 404.1528(a). A claimant’s statement of symptoms
13 alone is not enough to establish a physical or mental impairment. 20 C.F.R. § 404.1508,
14 404.1528(a).

15 Plaintiff contends at step two, the ALJ erred by failing to provide an evaluation of the
16 severity of diabetes, and degenerative joint disease of lumbar spine, olecranon bursitis and
17 bilateral knees, and that these conditions “significantly limit his physical and mental abilities to
18 do basic work activities.” Dkt. 22 at 4-5. The record does not support the contention. The ALJ’s
19 decision specifically acknowledged plaintiff suffers from trace multilevel retrolisthesis of the
20 lumbar spine, mild acromioclavicular and glenohumeral joint degeneration, small joint knee
21 effusion with early mild degenerative joint disease, diabetes mellitus with peripheral
22 polyneuropathy and sleep problems. Tr. 39. The ALJ found diagnostic imaging of plaintiff’s
23 lumbar spine showed “only trace multilevel retrolisthesis” and “there are generally no major

1 finding concerning the lower back in the record.” *Id.* The ALJ noted imaging revealed relatively
2 mild findings concerning plaintiff knees and despite reports of sharp pain in the right knee with
3 movement, examination revealed full range of motion and minimal patellar crepitation. *Id.*
4 Regarding Diabetes, the ALJ noted plaintiff started on medication and his HgA1c level remained
5 at 6 percent or lower. In 2015, plaintiff stated he had tingling in the left hand and both feet but in
6 December of that year “stated he was doing well managing his diabetes.” *Id.* In October 2016 a
7 treatment note indicated plaintiff had symptoms of neuropathy but the symptoms improved later
8 in the year. *Id.*

9 The record thus establishes the ALJ acknowledged and discussed plaintiff’s spine
10 problems, knee problems, degenerative processes, and diabetes, contrary to plaintiff’s claim she
11 did not. Plaintiff’s claim the ALJ did not evaluate these conditions accordingly fails. Plaintiff
12 also argues the “objective evidence” shows abnormal neurological symptoms; decreased range of
13 motion; left knee thinning of the medial compartment articular cartilage; ankle mild thinning of
14 the talonavicular articulation on the frontal projection; Dr. Parlato’s observation plaintiff had
15 difficulty sitting; tenderness and moderate swelling of the left hand and elbow; the need for knee
16 braces; and the addition of lithium for mental health symptoms. Dkt. 22 at 5.

17 Plaintiff has the burden to show the ALJ erred and a recitation of the findings that the
18 ALJ found not disabling or findings of record fails to establish how or why the ALJ erred. A
19 claim unsupported by explanation or authority, may be deemed waived. *See Northwest*
20 *Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 923-24 (9th Cir.1996); *Molina v.*
21 *Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012) (Plaintiff bears burden of showing harmful error).

22 Additionally, the ALJ touched upon the limitations flowing from the conditions above in
23 determining plaintiff’s RFC. Thus, even if the ALJ erred by failing to find the conditions severe

1 at step two, the error is harmless because the ALJ considered the symptoms of the conditions in
2 determining plaintiff's RFC.

3 **B. Residual Functional Capacity**

4 Plaintiff's argument that the ALJ's RFC determination is erroneous amounts to a
5 challenge of the ALJ's evaluation of the medical evidence. Dkt. 22. Plaintiff raises the following
6 arguments in his opening brief: "The ALJ minimized the symptoms of [plaintiff's] severe and
7 nonsevere physical and mental impairments and did not consider them in combination"; "the
8 ALJ did not include limitations for [plaintiff's] mental health conditions, she did not provide
9 limitations for absences or off task time"; and "The RFC did not specifically address all the
10 functional limitations such as sit, push pull, reach, handle, and finger. There were no
11 environmental limitations or hazards discussed." Dkt. 12 at 5.

12 These are conclusory statements. Plaintiff's disagreement with the ALJ's findings do not
13 alone establish error. The Court cannot play an advocacy role and set forth an argument
14 establishing error when none is made by the party bearing the burden of establishing harm.
15 Because plaintiff has failed to meet his burden the Court has been presented with no basis to find
16 the ALJ's RFC findings are based upon legal error or are not supported by substantial evidence.
17 *See Trevizo v. Berryhill*, 871 F.3d 664, 674 (9th Cir. 2017) (Court reverse the commissioner only
18 if the ALJ's decision is based on legal error or not supported by substantial evidence in the
19 record as a whole).

20 **C. Plaintiff's Testimony**

21 The ALJ did not find malingering and thus was required to making specific findings
22 stating clear and convincing reasons supported by substantial evidence to reject plaintiff's
23 testimony. *Smolen v. Chater*, 80 F.3d 1273, 1283-84 (9th Cir. 1996). Plaintiff contends the ALJ

1 erred by failing to provide clear and convincing reasons to discount his testimony. Dkt. 12 at 8.
2 Instead, plaintiff argues “the ALJ provides a summary of the objective evidence but does not
3 provide any specific reasons for rejecting [plaintiff’s] testimony. *Id.* Plaintiff also contends,
4 contrary to the ALJ’s findings, the record supports his testimony as there was an “abnormal
5 sensory exam with the inability to feel Tr. 890”; the ALJ identified no daily activities
6 contradicting plaintiff’s testimony; an “MRI February 27, 2017 showed talonavicular and
7 subtalar osteoarthritis with adjacent marrow edema; small partial thickness tears of the distal
8 Achilles tendon; and mild medial and lateral flexor tenosynovitis.” *Id.*

9 Plaintiff testified about both physical limitations and mental health limitations. In
10 determining plaintiff’s physical RFC, the ALJ noted plaintiff’s testimony of “worsening
11 symptoms affecting the ankles, knees and lower back; the need for surgery for the left ankle and
12 two knee braces; the need for a sling on the left elbow when it swelled; troubles maintaining
13 personal hygiene; and the need to have help with groceries and someone to take him to the store
14 and doctor’s appointments. Tr. 42. The ALJ found the evidence of record “is partially consistent”
15 with plaintiff’s testimony about the severity of his symptoms. Tr. 43. The ALJ discussed the care
16 provided by David Schilling, M.D. and his findings regarding pain and swelling of the ankle,
17 intact lower extremity sensation, reflexes and normal range of motion, spurring involving the
18 talonavicular and subtalar joints, small tears of the distal Achilles tendon and mild medial and
19 lateral flexor tenosynovitis. Tr. 43.

20 The ALJ found “the foregoing diagnostic studies [of Dr. Schilling] support the claimant’s
21 left ankle complaints to some extent and justify limiting him to light work with standing and walking
22 limited to four hours a day”; “the physical examinations however suggest that the symptoms are
23 not disabling and he could perform work within those limitations.” *Id.* Plaintiff has not

1 articulated reasons why the ALJ's determination of this evidence is erroneous. He disagrees with
2 the determination but his disagreement is insufficient to meet his burden of proof. Accordingly,
3 the Court will not disturb the ALJ's determination to discount plaintiff's testimony about his
4 physical limitations.

5 While the ALJ explained why she discounted plaintiff's testimony about his physical
6 limitations in assessing his RFC, she failed to discuss his testimony about his mental health
7 limitations. In order to properly determine plaintiff's RFC to work, the ALJ was required to
8 consider all of the relevant evidence as well as the combined effects of all of plaintiff's
9 impairments, even those not found to be severe. See 20 C.F.R. §§ 404.1545(a), 416.945(a) ("We
10 will consider all of your medically determinable impairments ... including your medically
11 determinable impairments that are not "severe" . . . when we assess your [RFC] . . . We will
12 assess your [RFC] based on all of the relevant medical and other evidence . . . We will consider
13 any statements about what you can still do that have been provided by medical sources, whether
14 or not they are based on formal medical examinations.").

15 The Commissioner does not claim the ALJ discussed plaintiff's testimony about mental
16 health limitations as part of the RFC determination. Dkt. 25 at 6. Instead, the commissioner
17 defends the ALJ by pointing to the ALJ's step three findings about plaintiff's severe mental
18 impairments and how plaintiff told medical sources he did laundry, cooked and spent time with
19 friends. *Id.*

20 The ALJ did not provide any reasons to reject plaintiff's testimony about his mental
21 health limitations in determining his RFC. The commissioner's argument plaintiff's testimony was
22 properly discounted as inconsistent with his activities is thus an impermissible post hoc argument
23 upon which the court cannot rely. *Bray v. Comm'r of SSA*, 554 F.3d 1219, 1225 (9th Cir. 1995)

1 (The Court reviews the ALJ’s decision “based on the reasoning and findings offered by the
2 ALJ—not post hoc rationalizations that attempt to intuit what the adjudicator may have been
3 thinking.”).

4 The commissioner suggests the error is harmless because the ALJ discussed plaintiff’s
5 mental health limitations at step three, and the Court should consider the ALJ’s decision as a
6 whole. The suggestion is misguided. Step three and RFC determinations serve different
7 functions, address different issues, and involve separate findings. If the claimant does not meet
8 or equal the requirements of a Listed Impairment and is not found disabled at step three, the
9 Commissioner must then assess the medical and other relevant evidence to determine the
10 claimant’s RFC to perform work-related activities, despite the limitations imposed by his severe
11 impairment or combination of impairments. 20 CFR §§ 404.1520(e), 416.920(e); Social Security
12 Ruling 96–8p, 1996 WL 374184 (July 2, 1996); *see also Keith K. Commissioner of Soc. Sec.*,
13 2019 WL 4889095 at * 3 (W.D. Wash. Oct. 3, 2019). .

14 “The RFC assessment must include a narrative discussion describing how the evidence
15 supports each conclusion, citing specific medical facts (e.g., laboratory findings) and nonmedical
16 evidence (e.g., daily activities, observations).” Social Security Ruling 96–8p, 1996 WL 374184
17 (July 2, 1996). Ruling 96-8 further states:

18 The adjudicator must remember that the limitations identified in
19 the "paragraph B" and "paragraph C" criteria [at step three] **are**
20 **not an RFC assessment** but are used to rate the severity of mental
21 impairment(s) at steps 2 and 3 of the sequential evaluation process.
22 The mental RFC assessment used at steps 4 and 5 of the sequential
23 evaluation process requires a more detailed assessment by
itemizing various functions contained in the broad categories found
in paragraphs B and C of the adult mental disorders listings in
12.00 of the Listing of Impairments, and summarized on the PRTE.

1 *Id.* (emphasis added). Here in assessing plaintiff's RFC, the ALJ failed to address plaintiff's
2 testimony. The ALJ's step three findings are not a substitute as the commissioner suggests, and
3 the ALJ accordingly harmfully erred.

4 **CONCLUSION**

5 For the foregoing reasons, the Court **REVERSES** the Commissioner's final decision and
6 **REMANDS** the case for further administrative proceedings under sentence four of 42 U.S.C. §
7 405(g). Plaintiff's appeal is limited to challenging the ALJ's determination that he is not disabled
8 before March 28, 2018. That is the sole issue before the Court and the remand order is thus
9 limited to that issue; all other aspects of the ALJ's decision, including the finding plaintiff is
10 disabled after March 28, 2018 shall be undisturbed. On remand, the ALJ shall, limited to the time
11 period prior to March 28, 2018, reassess plaintiff's testimony about this mental health conditions,
12 develop the record and redetermine plaintiff's RFC as necessary and proceed to the remaining
13 steps as appropriate.

14 DATED this 25th day of November, 2020.

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17 BRIAN A. TSUCHIDA
United States Magistrate Judge
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